BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition of the State Independent Alliance	)	
and the Independent Telecommunications Group	)	WT-00-239
for a Declaratory Ruling That the Basic	)	Wireless Telecommunications Bureau
Universal Service Offering Provided by Western	)	Commercial Wireless Division
Wireless in Kansas is Subject to Regulation as	)	
Local Exchange Service	)	

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its Comments in response to the petition filed in the above captioned proceeding.[2]

I. INTRODUCTION

At issue in this petition is how a wireless service offering provided by Western Wireless ("Western") in Kansas should be regulated -- using the wireline model of dual federal/state regulation or the streamlined approach for CMRS services set forth in section 332 of the Communications Act of 1934, as amended. In order to further local competition, the answer to this question is clear. In section 332 Congress provided for a competitive, deregulatory

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

2 See Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling That Western Wireless' Basic Universal Service In Kansas is Subject to Regulation as Local Exchange Service, Docket No. 00-239, *Public Notice*, DA 00-2622 (rel. Nov. 21, 2000).

framework that would govern all service offerings by CMRS providers, both fixed and mobile. Congress foresaw the possibility that CMRS providers would become competitors to traditional local exchange carriers and established the circumstances under which CMRS carriers should be regulated as traditional LECs; namely, "where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State."[3] In enacting the Telecommunications Act of 1996 ("1996 Act"), Congress further recognized that the presence of competition, and the corresponding absence of substantial, persistent market power, are the determining factors in setting the appropriate level of regulatory oversight. Firms are inherently not "similarly-situated" if they possess differing levels of market power; therefore, disparate regulatory treatment applied to monopoly and competitive firms is fully justified, as necessary to protect the public interest.

In the CMRS Flexible Service Offerings proceeding, the Commission concluded that "fixed services ... are permissible service offerings on spectrum allocated for broadband and narrowband CMRS."[4] The Commission modified its rules to allow CMRS spectrum to be used "on a co-primary basis for fixed services, mobile services, or any combination of the two."[5] The purpose of these changes was to promote innovation in the development of wireless services, and "stimulate wireless competition in the local exchange market," giving consumers a greater variety of service offerings.[6] The Commission intended that this flexibility would allow CMRS

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3 47 U.S.C. § 332(c)(3)(A).

4 Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965, at ¶ 2 (1996).

5 Id.

6 Id. at ¶ 3.

carriers to respond to consumer demands and generally increase competition in the telecommunications market.[7] Additionally, the Commission was encouraged by carriers' assertions that greater flexibility may allow "fixed wireless services [to become] a competitive alternative to wireline or mobile wireless service."[8] Consistent with the goals of the 1996 Act, the Commission concluded that allowing CMRS carriers flexible spectrum use would promote competition between CMRS carriers, and provide competitive alternatives to wireline local exchange service.[9] Thus, the Commission determined that the public interest is better served by a broad, flexible standard that does not limit potential uses of CMRS spectrum to specific applications.[10]

In the Second Report and Order, the Commission declined to establish a specific regulatory paradigm for services provided over CMRS spectrum.[11] The Commission concluded that the continuing changes and innovations taking place in CMRS technology and services make it too difficult to determine in advance how to regulate any fixed wireless or hybrid fixed/mobile service.[12] The Petitioners erroneously characterize the Commission's decision as a rejection of "any presumption that all wireless service offerings" provided by CMRS carriers are

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7 Id. at ¶ 1.

8 Id. at ¶ 8.

9 Id. at ¶ 22.

10 Id. at ¶ 19.

11 Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *Second Report and Order and Order on Reconsideration*, 15 FCC Rcd 14680, at ¶ 7 (2000) ("Second Report and Order").

12 Id. at ¶ 8.

CMRS services.[13] In fact, when it adopted a case-by-case approach, the Commission adopted a framework that permits CMRS carriers to provide a variety of services which will not automatically be subject to the state entry and rate regulation of local exchange carriers.[14]

In their Petition for Declaratory Ruling, the Petitioners request that the Commission find that Western's Basic Universal Service offering in Kansas is not a CMRS service, and therefore, the regulation of which would not be not preempted by Section 332(c)(3) of the Communications Act.[15] The Petitioners complain that because Western's offering is "intended" as a substitute for wireline local exchange service, it is not a CMRS service and thus should be subject to the same state regulations as the Petitioners.[16] Notably, the Petition extensively describes the ways in which Western's BUS service is similar to wireline local exchange service, but fails to provide any data demonstrating that the BUS offering constitutes a replacement for wireline local exchange service for a "substantial portion" of the State of Kansas, as the Act clearly requires.[17]

The recurring theme raised by the petition rests upon a fundamental misinterpretation of the notion of regulatory parity as it has come to be employed in recent years. That is, petitioners claim that because the provision of fixed services by Western, a CMRS carrier, is substitutable with the wireline local exchange service it should be subject to the same federal and state oversight accorded wireline LECs. This interpretation of "technology neutral" regulation completely confuses the notion of regulatory parity. Disparate regulatory treatment applied to

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13 State Independent Alliance and the Independent Telecommunications Group, *Petition for Declaratory Ruling*, at 5 (filed Nov. 3, 2000) ("Petition").

14 Second Report and Order, at ¶¶ 7-8.

15 Petition at 1.

16 Id. at 5.

17 47 U.S.C. § 332(c)(3)(A).

monopolist firms vis-à-vis competitive firms is fully justified, as necessary to protect the public interest.[18] In fact, Congress recognized this market power distinction and provided states with the ability to regulate CMRS carriers if, and only if, market power shifts from traditional wireline carriers to a CMRS provider in a particular state.

II. THE PETITION FAILS TO RAISE EITHER LEGAL OR POLICY JUSTIFICATIONS THAT WOULD SUPPORT REMOVING WESTERN'S LOCAL SERVICE OFFERING FROM SECTION 332.

A. Section 332 Establishes The Criteria Under Which States Can Regulate Wireless CMRS Services Offered In Competition To Traditional Wireline Service.

In section 332(c)(3)(A), Congress established as a matter of national telecommunications policy that CMRS would be largely exempt from state regulation in order to promote the rapid development of wireless telecommunications services.[19] Among other things, the amendment to section 332 spoke directly to the issue raised in the petition -- whether states can require CMRS providers to participate in local exchange regulation. The answer, found in the statute, is no. Congress preempted the states' authority to regulate CMRS carriers as LECS even where such services are offered in competition with traditional LECs. Congress further provided the conditions for states to regain authority to impose such requirements -- when CMRS becomes a substantial substitute for land line telephone service in a particular area.

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18 See Statement of Thomas Wheeler, President of CTIA, before the Progress and Freedom Foundation conference, as quoted in Communications Daily, Dec. 11, 2000, at 3 (noting that "industry leaders [should] stop using what [Wheeler] called 2 dirtiest words in the English language -- regulatory parity -- to drag new services into regulated world out of a sense of regulatory fairness.").

19 See generally Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 392 (1993); see also H.R. Rep. No. 103-111, at 260 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 587 (incorporated by reference in the Conference Report) ("House Report").

The Commission has understood section 332 to be a bar on state rate and entry regulation where a CMRS provider has not displaced the wireline monopoly.[20] In Pittencrieff, the Commission held that "the second sentence refers to a state's exercise of authority that would otherwise constitute prohibited regulation of rates or entry."[21] Relying upon the decision of a Federal District Court in Kansas, the Commission concluded that "'the second sentence of section 332(c)(3)(A) . . . clarifies that states wishing to ensure the universal availability of affordable telecommunications services may regulate the rates and market entry of commercial mobile service providers if certain preconditions are satisfied.'"[22] If those conditions are not satisfied, application of traditional wireline regulation on CMRS providers is prohibited.

Congress' purpose in adopting section 332 was and remains to promote competition by sheltering competitive services such as CMRS from unnecessary state-imposed regulatory burdens. Specifically, Congress made clear that the amendment to section 332 was intended to preempt state authority over wireless carriers and that the FCC was to permit state regulation (other than regulation governing the "terms and conditions" of CMRS service) only "if subscribers have no alternative means of obtaining basic telephone service,"[23] i.e., in instances where the CMRS provider has become the dominant carrier in the relevant market.[24]

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20 See Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, File No. WTB/POL 96-2, *Memorandum Opinion & Order*, 13 FCC Rcd 1735 (1997).

21 Id. at ¶ 24.

22 Id. at ¶ 24 (quoting Mountain Solutions, Inc. v. State Corporation Commission of the State of Kansas, 966 F.Supp. 1043, 1048 (D. Kan. 1997)).

23 H.R. Conf. Rep. No. 103-213, at 493 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1182 ("Conference Report").

24 Similar notions are expressed in section 253(f) of the Act. 47 U.S.C. § 253(f). In section 253, Congress intended to allow states to protect rural LECs by imposing certain local

A review of the legislative history supports this reading of section 332. The Conference Report stated that the requirement that a CMRS carrier be a substantial substitute for wireline services before being subject to state regulation was enacted to "describe the situation in which state authority to regulate commercial mobile services should be granted."[25] As explained in its discussion concerning the addition of this provision to section 332(c)(3)(A):

> the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.[26]

Congress's intent could not have been any clearer as it relates to this matter and to the Petition. These statements demonstrate that Congress (1) anticipated that CMRS providers would offer service in competition with local wireline carriers; and (2) expected CMRS providers to be regulated as local wireline monopolies only in instances where they have displaced the local wireline carrier as the dominant provider of telecommunications services.

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entry regulations that would otherwise be prohibited. CMRS providers, however, are expressly exempted from the state's jurisdiction in section 253, demonstrating that Congress anticipated that CMRS providers would offer competitive local service in rural areas and that the preemption of entry barriers found on sections 332 and 253 continued to apply with respect to CMRS carriers. See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, at ¶ 1014 (1996) ("[S]ection 253(f) permits the states to impose certain obligations on telecommunications carriers that seek to provide telephone exchange service in rural areas. The provision further provides that this subsection shall not apply to a providers of commercial mobile services. It would have been unnecessary for the statute to include this exception if some CMRS were not telephone exchange services.") (internal quotations and citations omitted) (emphasis added).

25 Conference Report at 493, reprinted in 1993 U.S.C.C.A.N. at 1182.

26 Id. (emphasis added).

The Commission has recognized that Congress refined federal regulatory policy governing CMRS to ensure the development of an efficient, federally-regulated, competitive marketplace.[27] Section 332 represents the culmination of congressional efforts to create a competitive, nationwide wireless telecommunications infrastructure free of unwarranted state burdens. As the Commission itself has stated, "the statutory plan [of section 332(c)] is clear. Congress envisioned an economically vibrant and competitive market. . . . Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate clear cut need."[28]

Rather than demonstrate a clear cut need for regulation by showing that Western has become the dominant carrier for the provision of basic service in a substantial portion of the State of Kansas, Petitioners argue that Western's service is not mobile. This argument is a red herring. As the legislative history and the Commission's nearly contemporaneous orders make clear, both Congress and the Commission understood that wireless carriers, using federally granted CMRS licenses could, and hopefully would, offer "basic telephone service" in competition with traditional LECs. To further this goal, such services were to be largely deregulated by both the Commission and the states unless they displaced the incumbent monopolist in terms of market dominance. In fact, Congress only reserved to the states authority

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27 See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Third Report*, 13 FCC Rcd 19746 at ¶ 2 (1998) ("Congress established the promotion of competition as a fundamental goal for CMRS policy formation and regulation."); House Report at 261-62, reprinted in 1993 U.S.C.C.A.N. at 588-89 (requiring the FCC "be mindful of the Committee's desire to give the policies embodie[d] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee").

28 Petition of the Conn. Dep't of Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Serv. Providers in the State of Conn., Report & Order, 10 FCC Rcd 7025, at ¶ 10 (1995), aff'd sub nom. Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d 842 (2d Cir. 1996) (emphasis added).

to regulate CMRS providers' basic telephone service if the wireless carrier was the sole local exchange services provider in the relevant geographic market, otherwise, state regulation of the CMRS provider was not implicated at all. The question thus posed by Congress, and ignored by Petitioners, is whether the underlying market power of the respective parties has shifted, not whether the services they provided were competitive.

Petitioners contend that "[b]ecause the service offered by Western Wireless is a fixed service intended to be a substitute for wireline telephone service, [it] is not CMRS and . . . regulation of the intrastate aspects of the service by the KCC is not preempted by Section 332(c)(3) or any other section of the Act."[29] This is not the standard established by Congress. The fact that the two services are intended to be competitive does not trigger state regulatory authority. Rather, as section 332(c) and its corresponding legislative history makes clear, Western's local service offering must be an actual substitute for the monopolist's services in a substantial portion of the state. It is, thus, incumbent on Petitioners to prove that Western's service offering meets this criteria, not to demonstrate that this service is not mobile. Because it fails to make the adequate marketplace showing, the petition to permit the KCC to regulate Western as a wireline LEC must be denied.

B. Concerns Over Technological Neutrality And Regulatory Parity Are Not Relevant In This Instance.

Petitioners argue that technological neutrality should guide the Commission in this instance.[30] They rely on the Commission's statements in the proceeding that deregulated the CMRS industry as support for their contention.[31] Comparisons to that proceeding, which

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29 Petition at 4 (emphasis added).

30 Petition at 16-17.

31 Petition at 17.

ensured a deregulated environment in an industry where no one carrier held dominant market power, with this proceeding, where the incumbent monopolist seeks to saddle new entrants with monopoly-style regulation, are specious.

The ultimate goal of policy makers in this era of transition from local exchange monopoly to competition should be to remove all unnecessary restrictions imposed upon telecommunications carriers. Regulatory restrictions become unnecessary and burdensome when there is sufficient competition. The marketplace will not benefit from regulatory policies that artificially encumber new entrants with needless regulation in the interests of promoting technology neutral solutions. That approach to regulatory parity was rejected many decades ago. This kind of all-or-nothing regulation -- in essence, government handicapping -- will not serve the ultimate goal of competition and consumer welfare. Rather, the solution is to remove unnecessary regulation and resist imposing new regulations for all providers lacking market power. This is precisely the approach Congress took when it amended section 332.

In essence, the Petition seeks to apply the old regulatory model to nascent competition, rather than allowing the development of competition in the provision of local telephone service to erode the underlying justification for government regulation -- market power. If the Commission truly intends to adopt policies that favor competition and not competitors, it should give CMRS providers incentives to enter the local exchange market and to compete vigorously. Disparity between the regulation of a new entrant and the regulation of carriers with dominant market position is irrelevant. To the extent that disparity is created between CMRS providers and other competitive LECs that somehow affects the operation of the market, the Commission should exercise its forbearance and other authority under the Communications Act to "level the playing field" correspondingly, i.e., remove for all competitive carriers unnecessary regulatory

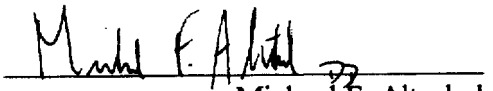
constraints established by state authorities. This outcome would be both desirable and natural, as it would tie reductions of regulatory scrutiny with the development of competition, consistent with Congressional intent.

III. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission deny the Petition for Declaratory Ruling and firmly establish that CMRS providers shall not be subject to traditional monopoly-style local exchange regulation.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION



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CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 21st day of December, 2000, copies of the attached document were served by hand delivery on the following parties:

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